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IN THE

Supreme Court of the United States

October Term, 1950

No. 87

WALTER K. WARREN,

Petitioner,

—against—

UNITED STATES OF AMERICA, as Owner of the Steamship "ANNA HOWARD SHAW", *et al.*,

Respondent.

N WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S RESPONSE

SAUL SPERLING,
and
CHARLES A. ELLIS,
Proctors for Petitioner.

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I

1. The calculated sophistry, misrepresentation and hypocracy evident in the "AMICUS CURAE" brief, we believe, will shock the Court. Yet it is in substance, particularly as respects the Convention, the argument which was made below by or in name of the United States Attorney, through the same counsel as "of counsel" for the United States Attorney and the United States.

2. Perhaps the most shocking of their arguments is that respecting the Convention; that "If, as petitioner contends, the Convention is the supreme law of the land, by implication, it overrules the Jones Act (46 USCA

688) and Death on the High Seas Act (46 USCA 761)" (*Brief of the United States Lines Company, Amicus Curae*, p. 18), and "overrules the Longshoremen and Harbor Workers' Compensation Act (33 USCA 901 *et seq.*)" (*Id.* p. 19); which are the sole grounds for their disputing Petitioner's contention that only by laws enacted subsequent to ratification of the Convention can the permitted exceptions thereto be made (*Id.* p. 22).

Of course, Art. 12 of the Convention itself plainly shows that the Jones Act, Death on the High Seas Act and Longshoremen and Harbor Workers' Compensation Act are unaffected. They are laws which ensure "more favourable conditions than those provided by this Convention". (Art. 12). When Article 12 was offered as an amendment by Mr. Sharrenberg, Workers Delegate, United States of America, he said:

> "I have been told by some of my friends that it is unnecessary. Nevertheless, in view of the fact that in the United States the safeguards accorded to seamen who are sick or injured are in some respects very much higher than those prescribed in this text, I do trust that you will permit me to add this saving Article to the pending Draft Convention" (*Record of Proceedings, International Labour Conference*, 21st and 22nd Sess., Geneva, 1936, p. 82).

Mr. MacDonald, Workers Delegate, Canada, said:

> "It is quite true that Article 19, paragraph 11, of the Constitution affords the protection which this amendment of Mr. Scharrenberg's gives, but labour organizations do not have a copy of this Constitution at hand every time they want it, and consequently it is much better to have this clause at the end of the

> Convention where everybody can find it when it is wanted. I therefore support the amendment submitted by Mr. Scharrenberg to add this new clause to the Convention" (Id. p. 83).

The Constitution Art. 19, par. 11 referred to (old Constitution), as well as corresponding Art. 19, par. 8 of the present Constitution, moreover, specifically use the phrase "to the workers concerned."

Yet *Amicus Curiae* asserts "Nothing is said as to who should be favored, shipowner or seaman" and that "It cannot be construed to be 'favorable to the seaman'." (*Brief of The United States Lines Company, Amicus Curiae*, p. 19.) This, and the pretense that the Convention affects the statutes cited, we submit, can be taken in no other sense than as calculated, deliberate misrepresentation.

The same is evident, moreover, even without reference to Art. 12. The liability provisions do not provide liabilities *for* sickness, injury or death, but liabilities "*in respect of*" sickness, injury or death, and merely *for* expenses of maintenance and cure, wages, repatriation, and burial expense, plus a provision as to safeguarding property. For these reasons also it is pure sophistry and misrepresentation to pretend that to apply these provisions involves overruling (in the Court below they said "repealing") the Jones Act, Death on the High Seas Act and Longshoremen and Harbor Workers' Compensation Act.

3. They further argue: that granting seamen shore-leave itself is an evil rather than wholesome practice and that "It is more often a detriment"; seamen have 15 minutes "coffee time" on shipboard; "There are radios for their diversion"; "They have also the companionship of

other seamen not on duty. During their non-working hours, they relax and enjoy themselves with men of their own social level;" "They have no 'rush hour' to endure as is the sad case of most shore workers when they ride to and from their place of work in buses or subways. Actually seamen have more free time than shore workers because they do not have to travel to their place of work" (*Brief of The United States Lines Company, Amicus Curiae*, pp. 10-11)!

Counsel who wrote that bit of sophistry could employ precisely the same words to extol the advantages of prison life over liberty. Penal laws and prison life, by that reasoning, become, not punishment, but privileges for enjoyment of which free men should vie in bidding.

In *Chelentis* v. *Luckenbach SS Co.*, 247 U. S. 372, 379, affg. CCA 2, 243 Fed. 536, 537-538, this Court and the Court below pointed out that:

> "If a seaman who had been *locked up or put in irons* for disobedience of orders were to sue the master for damages in a court of common law, *he could not recover like a shore servant*, such as a cook or chauffeur, who had received the same treatment" (247 U. S. 379; 243 Fed. 537-538). (Italics ours.)

A hasty check of prison laws reveals no Federal law subjecting even a convicted felon to such summary powers of physical discipline as being "placed in irons" or "placed in irons, on bread and water", as our statutes authorize a ship's master to do in case of seamen (46 U. S. C. §701, pars. Fourth and Fifth). No shore worker forfeits "one month's pay" for the mere temporary leaving of his place of employment, as does a seaman "For quitting the vessel without leave, after her arrival at the port of

her delivery" (*Id.* par. Third). No shore worker forfeits "all or any part of the wages or emoluments which he has then earned" and his "clothes or effects" for merely quitting his job, as does a seaman for "desertion" (*Id.* par. First). No shore worker forfeits, as does a seaman "two day's pay" for reporting late or for "absence at any time without leave" (*Id.* par. Second). See also 46 U. S. C. §595.

Even the statute as to "three watches" and "eight hours" work in one day is subject to "the judgment of the master or other officer" as to whether "the whole or any part of the crew are needed" (46 U. S. C. §673).

The truth is that, as a *practical* matter of human essentials, from even a wholly selfish shipowner's viewpoint, and wholly apart even from justice, humanity or benevolence, "No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it" (*Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 734).

4. "Amicus Curiae" Counsel are so versatile as on one page to refute and deny, and to assert and rely upon the opposite of, what they maintain on another. On the one hand, they claim that, *quite apart from the Convention*, seamen are allowed to recover maintenance and cure under facts which "range from barroom and street brawls to bedroom escapades"; that "Defense of claims by seamen to maintenance based upon alleged misconduct thus becomes a mirage" (*Brief of The United States Lines, Amicus Curiae*, pp. 11, 12-13, 24-26); that the *general maritime* rule is "unjust to the shipowner for *it leaves him defenseless* in claims of this kind" (p. 14). Then quite oppositely they argue that in interpreting the Convention "decisional law" should be treated as exceptions (p. 21)

because it required the seamen to bear the cost of their own maintenance "if the injury was due to misconduct or gross negligence" (pp. 21-22), and "*The terms of the Convention and their* impact on the existing laws of the United States make it inconceivable that the Convention be regarded as self-executing" (p. 20).

In other words, first claiming that decisional law affords the shipowner *no defense*, they ask this Court to *create* one by overruling decisional law; then claiming that decisional law *affords* a defense, but that "*The terms of the Convention*" leave the shipowner no defense, they ask that the Convention be held inoperative and that decisional law be maintained. Thus they really want this Court to overrule "decisional law", overrule the Convention, and make new rules to suit their whim; and if the Court will do this they don't care whether it be called "decisional law" or Convention law; or whether it destroy our Constitutional concept of the judicial power, destroy this and other similarly worded Conventions; destroy the International Labour Organization and its 31 years of work; and destroy the effectiveness of the treaty making power and our competitive foreign relations.

What they really want as shown by their conduct of the case from the beginning, and their dogged refusal to let go of it even after dismissal as to their private client was consented to, is to induce, by whatever means, some license from this Court for use in litigation, adjustment or rejection of injured seamen's small maintenance and cure claims of the epithetic, litigation breeding term "gross negligence" or some similar litigation breeding defense, and by all means to avoid that "rapid and inexpensive settlement of disputes concerning the liability of the shipowner under this Convention" (Art. 9), which all ratifying nations undertook to promote.

II

5. There is something either sinister or absurd, possibly both, in the filing here, as counsel for "Amicus Curiae", of a brief by the same counsel who, in name and by authority of the United States Attorney, represented the Government below; and the apparently designed dove-tailing of the Solicitor General's 137 page brief with the "Amicus Curiae" brief so as to present here, between them, the whole of the misrepresentive arguments made in the name of the United States below despite the Solicitor General's belated concession, in his brief here, that at least half of the propositions so argued below were error. While the Solicitor General withheld formal consent to the "Amicus Curiae" application the motion for leave stated "It is not the practice of the Department of Justice to so consent."

In the Petition (p. 7) and supporting brief (p. 23) we had pointed out that the United States as owner respondent had argued in its brief in the Court below opposite to the argument made by the Solicitor General in a Government's brief in this Court in *Farrell* v. *United States*, No. 267, Oct. Term 1948.

In opposing the writ the Solicitor General's brief sought to avoid the inconsistency by erroneously stating that "the *Farrell* case involved Article 4 of the Convention, not the article here presented" and that the Government had not urged in *Farrell* that "part of an article could be considered self-executing and the remainder of the same article inert" (Brief for the United States in opposition, p. 13, footnote 9). He took no forthright position respecting the operativeness and effect of either the liability provisions of the Convention or the provisos permitting

that limited exceptions may be made, but asserted (p. 14, footnote 10) that should the writ be granted, he would urge that "dicta" in the *Aguilar* case be reconsidered. What "dicta" he did not disclose.

Nevertheless, the Court will note that in our subsequent Petitioner's Brief we made no further comment on the inconsistency, called to the Solicitor General's attention in the Petition, between the argument by or in the name of the United States Attorney below, and his own argument in his *Farrell* brief.

Now, in the new 137 page brief—14 years after adoption of the Convention; 12 years after its ratification following a four-departmental, Presidential and Senate Committee study and interpretation; 11 years after date of its effectiveness as law of the land without any Congressionally made exceptions following a new nine-departmental-Commission-Board, Presidential, House Committee, House of Representatives and Senate Committee study, with hearings; 6 years after Petitioner's injury and expenditures for maintenance and cure; 5¾ years after institution of the libel; 3 years after trial of the case; two years after the Solicitor General's argument of the *Farrell* case; 9 months after decision induced by false argument herein in the Court of Appeals; 2½ months after grant of certiorari; and one week before argument—after requiring Counsel for a seaman Petitioner to brief fully, with research and citations entailing gruelling toil (not to mention the printing cost), the self-executing character of the liability provisions—the Solicitor General concedes, nay, *asserts* that "*Since 1939, the executive departments have consistently maintained the position that the Convention is self-executing in part*"; that in *Farrell* "*the Government relied*, in part, upon Article 4, *paragraph* 4, of the Convention and

contended that it is self-executing"; that "*This Court's acceptance of the Government's position* as to Article 4 (336 U. S. 511, 517, 524, n. 4) is, we believe, significant in interpreting Article 2, *paragraph* 1"; that "*it is obvious* that if Article 4, *paragraph 1*, is self-executing, Article 2, *paragraph 1*, must also be self executing"; and that "*there can be no question that Article 2, paragraph 1, is self-executing*" (pp. 35, 36, 37). (Italics ours.)

This, of course, means that liability herein at all times properly was and now is to be determined *under and in accordance with the provisions of the Convention.*

6. By the Convention, moreover, the United States solemnly undertook, by Art. 9, to secure "the *rapid* and *inexpensive* settlement of disputes concerning the liability of the shipowner *under this Convention.*" Thereby it owed herein four-fold that responsibility, by virtue of being (1) itself shipowner of the vessel on which Petitioner was employed; (2) the largest shipowner in the world, whose example must, accordingly, be of great significance; (3) sovereign co-maker of and party to the Convention, with resultant responsibility to see even that other owners subject to its jurisdiction complied; and (4) Petitioner's own sovereign, with similar special responsibility to Petitioner.

We submit that in keeping with Art. 9, as well as the full provisions of the Convention, it is the affirmative duty of the United States, through its officials, attorneys, agents and claim adjusters, in every case where a maintenance and cure claim is asserted against the United States, to call attention of the injured man and even of his attorney, if he have one, and of any Court, if the case be litigated, to the provisions of the Convention and its controlling effect on the rights of the claimant; and that the Government's

tactics in defense of this case represent a gross violation of that duty.

A Government official speaks with his tongue in his cheek when he refers in this respect to a seaman's representation by Counsel, knowing, as he must, that all such claims are small, and that Counsel therein cannot afford gruelling investigation—such, for example, as occurred herein—necessary in order to refute misrepresentation of treaty-made law, made out of or in Court by or in name of a United States Attorney.

The Convention is hidden in the Statutes at Large, and wholly unannotated there. When, therefore, the mighty office of United States Attorney in the foremost Southern District of New York asserts, even in formal briefs, when it is cited, that to attempt to enforce it would involve repeal of the Jones Act, Longshoremen's and Harbor Workers' Compensation Act and Death on the High Seas Act, and that it is or can better be treated as meaningless, and affirmatively insists to seamen, Counsel and the Court that the case is controlled by his construction of pre-Convention, ancient District or Circuit Court dicta, and induces primarily debate as to what was the pre-Convention decisional law, is it any wonder that no claimant to from $50 to $1500 or so has heretofore undertaken to ask this Court's judgment?

7. In footnote 9 on pp. 16-17 of his 137 page brief, the Solicitor General seeks to color the tactics below as made by private counsel, retained by the government *agent* and "*In protecting the interests of the agent.*" But the Court will note that the aforementioned arguments were made *after the case had been dismissed as to the agent by consent*, and when *only* the United States remained as respondent; and were submitted by or in name of the *United States Attorney*, although apparently authored by

the same counsel now submitting a brief for "Amicus Curiae", but then acting "of counsel" for the United States Attorney.

The Solicitor General, moreover, at p. 2 of his 137 page brief, footnote 1, appears to give the green light to such "Amicus Curiae" counsel's motion herein. No other shipping company or shipping company counsel have made any application to submit *amicus curiae* briefs, notwithstanding that New York is the greatest port in the world, nearly all great steamship companies have offices there, and the greatest of maritime law firms are there located; and nothwithstanding that the grant of certiorari herein has been published and even mentioned in law reviews as far as the Pacific Coast (See California Law Review, December). Why, then, these particular counsel, and presentation by them of precisely the same shockingly false arguments submitted below by or in name of the United States Attorney, representing the United States? And why the green light in the Solicitor General's brief?

8. It will be recalled that when at argument Mr. Justice Frankfurter asked whether Mr. Colby would undertake to assemble all departmental—particularly State Department—data relating to interpretation of the Convention, Mr. Colby hedged; and, if the recollection of Petitioner's Counsel is accurate, he never did agree that he would. Why?

With this small case presenting for the first time in this highest Court questions of such great national and international importance, and with the Government, including

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1 It is, so far as Counsel has been able to discover, the first time this Court has been asked to interpret the permissive provisos permitting any nation unilaterally to make limited modifications of the otherwise uniform positive liability provisions of this or any international Convention.

the State Department, having at stake its whole policy respecting this and similarly worded Conventions, whereas this lone seaman's stake is $664.16 expended on maintenance and cure, six years interest thereon, and the costs and disbursements incurred, are Mr. Colby's tactics designed to require that the seaman undertake that burden?

Or is it Mr. Colby's prior knowledge that any past or present opinion or ruling he could procure from the State Department or any other of the interested executive departments, would completely confirm Petitioner's interpretation?

The memorandum of Director General Morse, which we did not see until a week before argument, is rendered ambiguous by having been directed tangentially by the Solicitor General's letter to the words "national laws or regulations[2]," instead of directly to the policy controlling words *"may make exceptions in respect of."*

The truth is that for some reason assignable to an inexplainable mania for defeating, by whatever means, this seaman's $644.16 claim, the high office of the Solicitor General of the United States, adopting to that degree the pattern followed below by the high office of United States Attorney, we believe, has seen fit both to misrepresent the position and rulings of the interested executive departments.

2 Note that Article 11, which was not called to the Director General's attention, reads: *"This Convention and national laws or regulations relating to benefits under this Convention* shall be so *interpreted and enforced* as to ensure equality of treatment to all seamen, irrespective of nationality, domicile or race". Pre-Convention Court decisions, rendered by judges who never heard of the Convention, certainly cannot be said to be laws "relating to benefits under this Convention" nor are they such as to be "interpreted and enforced," as such words are here used.

III

9. The misrepresentation of the Executive Departments' interpretations in the Government's brief (Brief for the United States, Argument I, B, 3, pp. 60-66), by Mr. Colby at oral argument, and by the Amicus Curiae brief (Brief of the United States Lines Company, Amicus Curiae, p. 21) and the misuse and misconstruction of Mr. Morse's memorandum (Brief for the United States, pp. 98-102 and pp. 40-47, 56) make a tactical house of cards for the building of which in this case there simply can be no worthy explanation.

The two briefs claim that it was represented by these departments, particularly Mr. Hull, that no increase of costs could be involved, and the Solicitor General quotes language from Mr. Hull's letter of August 18, 1937, which he represents to justify this claim. Yet, in Mr. Hull's letter of August 18, 1937, from which the Government's brief quotes at length (pp. 61-62), and just two paragraphs from where the Government's quotation was ended, Mr. Hull said:

> "It is desired to *call attention* to the following statements in the attached report of the Chairman of the United States Maritime Commission:
>
> "'*The adoption of some of the Conventions will increase the cost of operating ships.* Accordingly, if ratified by the United States and the required number of member countries of the conference, and enacted into law by them, *several of these Conventions will increase operating costs of American flag vessels*, and will also increase the operating costs of vessels of other nations that ratify such conventions'' (H. R. Report No. 1328, 76th Cong., 1st Sess. p. 10; see also

same letter in Senate Exec. Report 8, 75th Cong., 3rd Sess.). (Italics ours.)

In the letter of Chairman Joseph P. Kennedy, of the United States Maritime Commission, dated August 11, 1937, he stated:

> "These proposed conventions, if adopted as the law of the United States, will in some respects, as pointed out in the enclosed memorandum, affect the working conditions of many persons *and increase the operating costs of American vessels. In view of that fact* it is believed that an opportunity should be offered to the parties who will be affected, to submit their views on *the proposed changes in the applicable law of the United States* prior to final action being taken by this Government" (H. R. Report No. 1328, *supra*, p. 19; see also Senate Exec. Report 8, *supra*. (Italics ours.)

The memorandum he enclosed stated, cautioned, and suggested:

> "*No information is available from which accurate estimates can be made of increases in operating costs that would result if these conventions were ratified. Because of that factor* it is suggested that before the Government of the United States adheres to the conventions in question, either there be obtained definite information as to the course of action of the principal maritime countries upon the conventions, or that, if found desirable, the conventions be ratified with appropriate reservations so that they will become effective only when accepted by such countries. In the meantime, should any one of the proposed *changes* be considered desirable for American vessels, irrespective

of the standards in foreign countries, such *changes* could readily be made by legislation without any special reference to or connection with these conventions and recommendations" (H.R. Report No. 1328, *supra*, p. 24; see also Senate Exec. Report 8, *supra*). (Italics ours.)

It also stated, with specific reference to this Convention 55:

"If contrary to the above recommendation, it is decided to adhere to the convention, *responsibilities will be placed upon the shipowner greater than the present ones, and the cost of operating American vessels will naturally increase*" (*Id.*, p. 23). (Italics ours.)

"Under this convention the shipowner *is liable* in respect of sickness and injury occurring between the date of reporting for duty and the termination of the engagement as well as death resulting from such sickness or injury. It is provided that national laws or regulations *may except* cases of injury incurred other than in the ships service; injuries and sickness due to the wilful acts, default, or misbehavior of the person and sickness concealed when employed" (*Id.*, p. 19).

A memorandum of August 13, 1947, by the Acting Solicitor of the Department of Commerce stated that "These conventions involve questions of policy" (H.R. Report No. 1328, *supra*, p. 13) and, referring specifically to the provisos permitting exceptions, said (as to Article 1, Cl. 2), "However, it is provided in paragraph 2 of this article that any member of the international labor organization *may except* such casual employees *from the convention*".

(*Id.*, p. 14), and "article 2 of the convention *makes a shipowner liable* in respect of sickness and injury, and death resulting from such sickness or injury (with a further provision that national laws or regulations *may make exceptions* in respect of injury or sickness occurring under certain conditions referred to in paragraph 2 of that article)" (*Id.*, p. 16).

In 1939, in connection with submitting *H.R. 6881* The Secretary of State said, by letter of June 12, 1939:

> "Some of the articles of the convention, however, after stating the general rule, provide that national laws may make specified exceptions thereto. If this Government is to be excepted from certain obligations of the convention or alterations in our present practice, it is necessary to do so affirmatively by statute" (Id., p. 6).

The Maritime Commission, by letter dated July 7, 1939, said:

> "The extent of the liability of the shipowner in all maritime nations has depended, until recently, upon the maritime law * * * The provisions of the convention are so framed as to permit *the adaptations* required by workmen's compensation laws" (Id., p. 32)

He refers to the permitted exceptions under Art. 2 (2) as being made "*by section 4 of the bill*" (Id., p. 32). The bill did not become law.

The Secretary of Labor wrote:

> "The convention prescribes general standards but leaves certain details *to be prescribed* at the *option* of the signatories. H. R. 6881 is designed to make neces-

sary provision for these *optional matters* * * * " (Id., p. 49).

IV

10. When analyzed the Government's argument reduces to the contention that the Courts should "make exceptions" *because* Congress omitted or refused to make them; whereas in reality the omission of Congress to act is a most cogent reason why the judiciary should not act in its place.

It was indeed *Congress* to which the administration submitted the question of whether to "make" or not to "make exceptions?" It was *Congress* to whom the administration applied in 1939 for determination or exercise of the "national discretion".

The *omission* or refusal to "make" the discretionary exceptions, is as much an exercise of the "national discretion" as would be an actual making of exceptions. Compare *Julius* v. *Lord Bishop of Oxford*, L. R. 5 A. C. 214, where the Lord Chancellor (Earl Cairns) said that "the question is * * * is the Bishop *bound* * * * to issue a commission, or has he *a discretion as to whether he will issue it or not?*" (p. 222), and "I will only add that *if I am right in holding that the bishop has * * * a discretion * * * your Lordships have not, as it seems to me, any occasion or indeed any right to examine into the manner in which, or the principles upon which, that discretion has been exercised*" (p. 228). Lord Penzance said that words conferring discretion are "permissive and enabling only" (p. 234), Lord Selborne that they are "potential" (p. 235), Lord Blackburn that they were "equivalent to *may*" (p. 242) and "gave the bishop power to grant farther inquiry * * *, trusting that he would always do so where it was proper; but *leaving it open to him, when convinced that it was not proper, to decline to act*" (p. 238).

11. The political, policy making, "national discretion" exercising departments of our Government are the Executive department and Congress—plus that portion of the two represented in the treaty-making power. These have acted. The 1939-1940 history of *H. R. 6881* shows this. Such bill *was* introduced. It represented the interpretation by practically the entire administrative branch that the department of government wherein the "national discretion" resided was Congress. That discretion was as much a discretion to *omit* to "make exceptions" as to "make" them. There could be no discretion to "make exceptions" without equally, and as part of it, a discretion to *omit* to "*make exceptions*". The hearings before the House Committee July 11, 1939 (Hearings, Committee on Merchant Marine and Fisheries, 76th Cong. 1st Sess., on H. R. 6726 and H. R. 6881) and before the Senate sub-committee July 23-25, 1940 (Hearings, Subcommittee of the Committee on Commerce, 76th Cong., 3rd Sess., on H. R. 6881) were a year apart. The Executive departments submitted letters at both hearings, and the administration was represented in testimony. So were shipowners and seamen. The legislation was not enacted. This was as completely within the "national discretion", and control of Congress, as would have been its enactment.

The same discretion, moreover, resides in Congress today. Whence comes the theory, therefore, that the *judiciary* must exercise the discretion? Why do Mr. Colby and Amicus Curiae counsel, in effect, petition this Court rather than Congress to "make exceptions"? The "question is at least debatable" whether the Convention liabilities should be "left unregulated, or in some measure restricted;" and "that decision" is "for Congress" and a Court's or jury's judgment cannot "be substituted for it" (cf. *United States v. Carolene Products Co.*, 304 U. S. 144, 154).

Tucked away in two footnotes of the Solicitor General's brief (Footnote 40, p. 37, footnote 44, p. 43), the Government concedes that the question is one of "municipal, not international, law".

This Court has often ruled that "It is our business to execute the law as we find it, and not to *make* or *modify* it" (*Bank* v. *Sherman*, 101 U. S. 403, 496); "the power to *make* and *unmake* is essentially political and not judicial" (*United States* v. *Old Settlers*, 148 U. S. 427, 468); "It is true the *non action* of Congress may occasion a temporary inconvenience; but it does not follow that courts of justice are authorized to remedy it by *inverting the ordinary meaning of words*" (*De Lima* v. *Bidwell*, 182 U. S. 1, 198). (Italics ours.)

Congress can, when need exist, act more quickly than the courts. It can by hearings, moreover, better determine the national wish and policy; and can also determine this on a broad level, debating and taking account of all points of view. The Courts can act only in determination of the specific "case" or "controversy" before them. If "exceptions" are so vitally needed, why have they not again been sought from Congress? Why are they sought here instead? And what becomes of the "national discretion" to "make exceptions", if this Court rule that, despite omission of Congress to "make" any, they exist? How can Congress then exercise a discretion to "make" or *omit* to make what already exists?

12. The "repeal" theory begs these questions, and is inherently fallacious. Even *H. R. 6881* was not worded as making any "repeals" of "decisional law". Nor was Title II thereof as added by Senator Overton, nor *H. R. 7626* which was considered in the House. Nor were the Longshoremen and Harbor Workers' Compensation Act,

the Jones Act, the Death on the High Seas Act or the Employers Liability Act. They simply enact a new rule of liability which *supercedes* anything inconsistent with it. Indeed, §26 of the Seaman's Act of March 4, 1915, c. 153, 38 Stat. 1185, which represented, in effect, an actual attempt to apply such a "repeal" theory, by providing that "seamen having command shall not be held to be fellow-servants with those under their authority", was held in *Chelentis* v. *Luckenbach SS Co.*, 247 U. S. 372, 384, to be meaningless, of no consequence and irrelevant. But in *Reed* v. *Director General of Railroads*, 258 U. S. 92, 95, with the same Justice writing, it was held unanimously that "*the first section*" of the Employers Liability Act "has the effect of abolishing . . . the common law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff." The Court said that "To hold otherwise would conflict with the declaration of Congress that every common carrier by railroad while engaged in interstate commerce *shall be liable* to the personal representative of any employee killed while employed therein, when death results from the negligence of any of the officers, agents or employees of such carriers" (258 U. S. 95).

So it is with every "shall be liable" enactment. So it is with the liability provisions of the Convention here. *They* correspond so the terminology of "*the first section*" of the Employers Liability Act. *They* are the statute-like provisions, and accordingly supersede, just as would like provisions in a statute, the pre-Convention rules and decisions.

The proviso clauses permitting that national laws "may make" exceptions, on the other hand, are not statute like. They would never have been embodied in a statute of a lone

sovereign. It would not have been necessary, and even would have been silly, for such lone soverign's legislature to provide that it "may make" exceptions. It would have both the power and the right to do so whenever it chose, without so providing. Even here, every sovereign has the *power* to do so, and would have such *power* without the permissive clause. But to exercise such *power* without consent of the other parties to the treaty would not be its *right*, in absence of provision therefor in advance. The proviso clauses, thus, are not even the source of *power*, but the manifestation only of *permission* or *consent*. The question of *power*, therefore, remains as it would have been had the liability provisions been made by statute, a question of our own constitutional division of powers of government. What branch could "make exceptions" to liability provisions of a statute which contained none?

Clearly, Congress alone. As the treaty-making power, as even the Solicitor General now concedes and contends, definitely has made as though by statute positive and enforceable liability provisions, but equally as definitely has *not* made exceptions, but rather only agreed multilaterally with the other treaty sovereigns that each, including our own government "may make" exceptions, at its national option or "national discretion," it clearly is, under our Constitution, Congress alone that "may make" them—if and when it chooses, and equally may *omit* to "make" them as long as it chooses.

13. This construction is confirmed instead of rebutted by the very distinction attempted by the Solicitor General of the Officers Competency Certificate Convention legislation mentioned in Petitioner's Brief, pp. 31-32. The Solicitor General states as the distinction that "The exception embodied in that legislation was not reflected in any existing

rule of maritime law and hence could be availed of *only through enactment of a specific statute*" (Brief for the United States, p. 65, footnote 59; italics ours). In the first place, this affirms that it is "*only through enactment of a specific statute*" that our country "may *make*" exceptions. But, of more importance, it confirms that until and unless some research be undertaken into pre-Convention decisional law, the treaty provision is both perfectly simple and perfectly clear. It means what it says and our government, accordingly, under our Constitution, *can* "make" exceptions only through enactment of a specific statute.

It is only through reaching back into pre-Convention decisional law—by exploring whether or not there existed any pre-Convention decisional law, and then (if any be found) by studying, assorting and applying it—that any question or doubt can be raised, or any contention be advanced for "construing" the simple provision to mean something wholly different than it clearly, and admittedly, means, if there be none such to so apply. Moreover, the reaching back is into only our own pre-Convention decisional law. If Afghanistan, for example, became a ratifying member and acquired a merchant marine, it would have no pre-Convention decisional law to refer to; and the provision would be perfectly plain. To have exceptions apply, it would have to, "*make*" them—just as the Convention provides. But the Solicitor General does not suggest that we reach back to discover the non-existence of pre-Convention law in Afghanistan, as proof that the Convention clause nevertheless has clear meaning; he proposes to reach only into the pre-Convention field of a sovereign from whose old rulings some doubt can be created.

This, however, is directly contrary to this Court's consistent rulings, perhaps best evidenced in *Hamilton* v.

Rathbone, 175 U. S. 414. There, under decisional common law a married woman had been without capacity to convey her property without consent of her husband; then by an 1869 statute it had been provided that property acquired by her "in any other way than by gift or conveyance from her husband, shall be as absolute as if she were feme sole," and she might dispose of "the same, or any interest therein, in the same manner and with like effect as if she were unmarried." Then by 1874 revision of statutes, the old act "was rearranged," and although new §727 contained the same provision as to the absoluteness of her property acquired otherwise than from her husband, new §728 provided that any married woman might dispose of "her property, or any interest therein, in the same manner and with like effect as if she were unmarried". The Court stated the decisive question as being whether §728 was to be "construed as an independent act, or whether the plaintiff is at liberty, by referring to the prior act from which it was taken, to show that it was the intention of Congress to limit it to the cases named in such prior act" (p. 419). This Court, by Mr. Justice Brown, said:

> "The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity. If section 728 were an original act, there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper interpretation. • • • The main object of the revision was to incorporate all the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume, without the necessity of refer-

> ence to prior statutes upon the subject. If the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it. If it be but another volume added to the prior Statutes at Large the main object of the revision is lost, and no one can be certain of the law without an examination of all previous statutes upon the same subject" (175 U. S. 421).

When we recall that, in addition to the revision process, here there was a purpose of "codifying and uninformising the law" (Petitioners Brief, p. 19); that in connection with adopting Article 12 it was specifically stressed that even it should be in the Convention "where everybody can find it when it is wanted" and without the necessity of referring even to a copy of the Labor Organizations' own Constitution, which might not be "at hand every time they want it" (*supra* p. 2 hereof); that Article 12 is, in fact, the *only* savings clause, and cannot possibly be said itself to save pre-Convention decisional law defenses; that the natural construction of the proviso permissive clauses to permit only post-Convention modifications makes it simple for anyone at anytime in any country to quickly ascertain precisely what is the law, whereas the other would require always and everywhere just as much (and even more) research and distinction making as though the Convention had not been adopted; and that the whole principle of *reciprocity*, so vital in treaties, would be destroyed, because one country would refer to conflicting and confusing pre-Convention decisions, another to pre-Convention statutes, others yet to different pre-Convention decisional law or statutes, and still others to a pre-Convention absence of precedent—with some obliged to "make", others to "*un*make", still

others to modify, either upward or downward, their own old rules, if any uniformity were to be obtained—we submit there can be no doubt whatever, under *Hamilton* v. *Rathbone*, *supra*, or under the Convention, that these permissive proviso clauses should be construed as Petitioner contends.

V

Neither of the opposition briefs shows anything or any authority for treating Warren's conduct as more than bare negligence—mere momentary, inadvertent absence of considered carefulness.

Neither shows any reason why the ever recurring ship-owner claims that liability spells insurance should bar rather than occassion recovery.

Petitioner should be allowed interest, as well as costs and disbursements, in addition to his $644.16 maintenance and cure expense.

Respectfully submitted,

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and
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